

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
KAISER ALUMINUM & CHEMICAL
CORPORATION,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 82-20

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal from the denial of Tax Credit Application Nos. 1635, 1636 and 1637, came before the Pollution Control Hearings Board, David Akana (presiding), Gayle Rothrock, Chairman, and Larry Faulk, at a formal hearing in Lacey on October 14 and 15, 1982

Appellant was represented by its attorney, Edward M. Lane; respondent was represented by Patricia A. Hickey, Assistant Attorney General. Court Reporter Jane Johnson and Karen Kendrick recorded the proceedings.

At the outset of the hearing, respondent moved for an order

1 granting it summary judgment on the ground that some of the facilities
2 covered by appellant's application were installed in response to a
3 requirement by the Department of Ecology and/or that the applications
4 were not timely filed. After argument, the motion was denied.

5 Having heard or read the testimony, having examined the exhibits,
6 and having considered the contentions of the parties, the Board makes
7 these

8 FINDINGS OF FACT

9 I

10 Appellant Kaiser Aluminum & Chemical Corporation (hereinafter
11 "Kaiser") owns and operates an aluminum reduction facility at its Mead
12 Works in Spokane, Washington.

13 II

14 The reduction facility processes alumina in reduction cells. Each
15 cell has a carbon lining which performs a necessary function in the
16 manufacturing process. After its useful life--between 400 and 1200
17 days--the spent carbon lining is removed. A by-product in the lining
18 from the manufacturing process is cyanide.

19 III

20 For years it has been the practice at the Mead facility to store
21 the spent linings in an open area. This practice continued until a
22 number of wells in the Mead area showed evidence of cyanide in them.
23 After a period of investigation, the source of the cyanide was
24 determined to originate from the spent pot lining storage area at
25 Kaiser's facility. Kaiser notified the Department of Ecology (DOE),

1 the Spokane Health Department, nearby people and the news media in the
2 summer of 1978.

3 IV

4 On October 11, 1973, DOE directed Kaiser to stop removing the
5 potlinings by soaking them with water until an approved water
6 treatment system was installed. Order DE 78-457. Kaiser was also
7 directed not to discharge wastewater containing concentrations of
8 cyanide exceeding 50 parts per billion. The order became effective
9 immediately. A penalty for violation of its NPDES Waste Discharge
10 Permit was issued by DOE on December 29, 1978. Order DE 78-576.

11 On October 12, 1978, the Spokane County Health District ordered
12 Kaiser to stop the discharge of water from the potlining removal
13 operation and to prevent leaching of precipitation waters through the
14 large pile of spent potlinings.

15 The spent linings were covered with plastic and rubber tires. In
16 late May of 1979, the pile of spent linings was covered with asphalt.
17 The DOE concurred with the idea of covering the pile.

18 Kaiser also stopped soaking its pots. DOE's concerns about the
19 spent lining storage were met with the sealed asphalt slab and a
20 runoff collection system.

21 Despite the above measures, no improvement in cyanide levels were
22 observed in nearby wells.

23 V

24 Further investigation suggested that water from a nearby unlined
25 settling basin, known as Tharpe Lake, was leaking down to impermeable

1 clay lenses, through cyanide-contaminated soil under the storage area,
2 and into the aquifer. After temporary measures to seal the basin
3 failed, in June, 1981, Kaiser requested and was given DOE approval to
4 construct a new settling basin.

5 VI

6 The new settling basin was built about 2000 feet from the old site
7 at a cost of \$244,000. Kaiser applied for tax credits (No 1637) for
8 the relocation of the basin. The application was denied by DOE
9 because the work done was deemed not to be in response to an order,
10 permit or regulation.

11 VII

12 In 1981, Kaiser submitted plans for a spent potlining storage
13 building. The building was planned to store potlining waste material
14 which was temporarily stored on a paved area and to store additional
15 new waste material. The building was designed to provide a dry
16 storage area for potlining material.

17 The plans were approved by DOE on May 26, 1981.

18 VIII

19 The storage building was constructed at a cost of \$680,000.
20 Kaiser expects the building to provide five year's storage capacity
21 after which another building will be constructed.

22 Kaiser applied for tax credits (No. 1635) for the building. The
23 application was denied by DOE because the work was deemed not to be in
24 response to an order, permit or regulation.

IX

In August of 1981, Kaiser submitted to DOE a "Notice of Construction" declaring an intent to construct, install, or establish a new air contaminant source (superstructure cleaning facility) under chapter 70.94 RCW. After reviewing the notice and environmental checklist, DOE determined that no DOE permit was required because air contaminant emissions would not be increased.

X

The superstructure cleaning facility is a 17 foot by 40 foot enclosure built over an existing floor hopper within an existing building. The reduction cell superstructures on trailers will be cleaned in the enclosure. Particulate matter is to be captured in a dust collector. The facility will reduce worker exposure to high levels of dust and will reduce incidental fugitive emissions into the atmosphere. The facility may also be used for general cleaning and dumping of other equipment.

XI

The superstructure cleaning facility is expected to be completed at a cost of \$408,000. Kaiser applied for tax credits (No. 1635) for the facility. The application was denied by DOE because the work was deemed not to be in response to an order, permit or regulation.

XII

Kaiser is the holder of NPDES permit No. WA 000087-6 which was issued on November 25, 1974, again on July 10, 1978, and modified on January 1, 1979. The expiration date was July 1, 1981. On June 18,

1 1981, the permit was extended without modification.

2 The permit allows the discharge of certain effluent into Peone
3 Creek. The effluent authorized to be discharged does not include
4 cyanide into any receiving surface or ground water.

5 XIII

6 On August 14, 1980, the DOE filed the rules pertinent to primary
7 aluminum plants, chapter 173-415 WAC.

8 On August 20, 1980, the DOE filed its last pertinent major
9 amendment to its General Regulations for Air Pollution Sources,
10 chapter 173-400 WAC.

11 XIV

12 On November 30, 1981, Kaiser filed Tax Credit Applications
13 Nos. 1635, 1636 and 1637. For a period exceeding one year before such
14 filing, DOE had not promulgated any specific requirement for Kaiser's
15 Mead facility. No specific requirements became effective in the one
16 year period before such filing.

17 <7

18 Any Conclusion of Law which should be deemed a Finding of Fact is
19 hereby adopted as such.

20 From these Findings the Board enters these

21 CONCLUSIONS OF LAW

22 I

23 Tax credit and exemption statutes are strictly construed in favor
24 of application of the tax E.g. International Paper v. Revenue.
25 92 Wn 2d 277, 279 (1979). The burden of proof to show that a tax

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB No. 82-20

1 credit or exemption should apply is on the appealing party.

2 II

3 As relevant to this matter, RCW 82.34.010(5) provides:

4 "Certificate" shall mean a pollution control tax
5 exemption and credit certificate for which
6 application has been made not later than December 31,
7 1969: Provided, That with respect solely to a
8 facility required to be installed in an industrial,
9 manufacturing, waste disposal, utility, or other
commercial establishment which is in operation or
under construction as of July 30, 1967, such
application will be deemed timely made if made within
one year after the effective date of specific
requirements for such facility promulgated by the
appropriate control agency.

10 An application is timely if made a) by December 31, 1969 or
11 b) within one year after the "effective date" of "specific
12 requirements...promulgated by the appropriate control agency" for a
13 "facility" required to be installed in an industrial, manufacturing,
14 waste disposal or other commercial establishment "which is in
15 operation or under construction as of July 30, 1967."

16 The instant application was filed with the Department of Revenue
17 on November 30, 1981. This date is after December 31, 1969, and is
18 not timely unless the proviso applies.

19 The "specific requirement" referred to in the proviso of
20 RCW 82.34.010(5) has been interpreted by DOE in WAC 173-24-090(1)¹
21

22 1. WAC 173-24-090 provides:

23 A facility will be considered to be installed or
24 intended to be installed for the primary purpose of
25 pollution control when:

1 as a "requirement of the department...contained in a permit, order, or
2 regulation" See also WAC 173-24-100. The requirement must
3 also be based upon chapter 90.48 RCW or 70.94 RCW and not some other
4 statute. RCW 82.34.030; WAC 173-24-090(2)

5 DOE is the appropriate agency with the authority to adopt rules
6 and regulations as are necessary to carry out its statutory duties
7 under chapter 82.34 RCW. Its interpretation of the statute are
8 entitled to great weight. The rules appear to be reasonably
9 consistent with the statute and we will not substitute our judgment
10 for that of DOE's.

11 Accordingly, we conclude that a requirement of DOE must
12 specifically be contained in a formal permit, order, or regulation,
13 and not informally by letter or telephone call.

14 III

15 Kaiser did not make application for tax credits within one year
16 after the effective date of any specific requirements for its
17 facility. Accordingly, each application was not timely made.

18
19
20 1 Cont (1) It was installed or intended to be installed
21 in response to a requirement of the department or a
22 regional or local air pollution control
23 authority contained in a permit, order, or regulation
which applies to the particular industry or
commercial establishment [in] [is] question, and such
facility meets or exceeds the requirements of such
permit, order, or regulation and

(2) It was installed pursuant to a requirement
developed under chapter 90.48 RCW or 70.94 RCW and
not under some other statute administered by the
department such as, for example, chapter 70.95 or
70.105 RCW.

1 Assuming Kaiser was responding to requirements developed under chapter
2 70.94 and 90.48 RCW, it was complying only with existing laws which
3 were in effect for more than a year. It would not be appropriate to
4 allow tax credits for facilities which ought to have been complying
5 with such laws beforehand whether or not DOE issued a formal order or
6 permit.

7 IV

8 There are some questions raised by respondent regarding whether
9 the facilities were installed as a result of a requirement developed
10 under chapter 90.48 RCW or 70.94 RCW. We do not need to address these
11 questions because they were not the basis for the DOE decision. If
12 DOE were to fully consider the merits of the applications, which it
13 has not yet done, these questions would then be reviewable.

14 V

15 The Department of Ecology decisions on Tax Credit Applications
16 Nos. 1635, 1636 and 1637 should be affirmed.

VI

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

The Department of Ecology decision on Ta. Credit Application Nos 1635, 1636, and 1637 are affirmed.

DONE this 8th day of December, 1982

POLLUTION CONTROL HEARINGS BOARD



DAVID AKANA, Lawyer Member



GAYLE ROTHROCK, Chairman

See Dissenting Opinion

LAWRENCE J. FAULK, Member

1 LAWRENCE J. FAULK'S DISSENT:

2 Kaiser's three facilities were designed and constructed in
3 response to requirements of the Department of Ecology (DOE). Although
4 the requirements were not reduced to orders in a formal sense, they
5 were orders nonetheless.

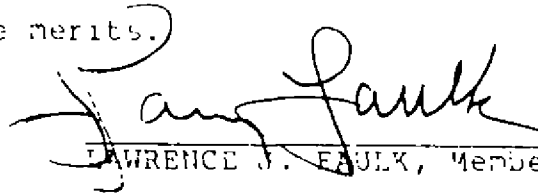
6 In the letter of May 26, 1981, from DOE to Kaiser, DOE granted
7 approval of the construction of the potlining waste storage building
8 with specific directions. These requirements were confirmed in a
9 letter dated July 6, 1982, from DOE to Kaiser. The evidence shows
10 that if Kaiser had not proceeded to address the problem of hazardous
11 waste storage, a specific order would have been issued ordering Kaiser
12 to do so. Kaiser's tax application No. 1635 was filed on November 30,
13 1981, within one year of DOE's approval.

14 In its letter dated June 1, 1981, DOE confirmed its verbal
15 approval to seal Thorpe Lake with bentonite. The letter recognized
16 that the sealing was only a temporary solution, and that a permanent
17 solution was required. Following this direction, Kaiser constructed
18 a new lake at a different location with the verbal approval of DOE.
19 The evidence shows that if Kaiser had not cooperated and constructed
20 the new lake, a formal order would have been issued. Kaiser's tax
21 application No. 1637 was filed on November 30, 1981, within one year
22 of DOE's approval.

23 In its letter dated September 28, 1981, DOE gave its approval to
24 the construction of a superstructure cleaning facility. The facility
25 was designed primarily for the control of fugitive emissions which

1 would otherwise have been cleaned outside. Kaiser designed the
2 facility in cooperation with DOE with the necessity of a written
3 order. Kaiser's tax application No. 1636 was filed on November 30,
4 1981, within one year of DOE's approval

5 In summary, Kaiser's three tax applications were timely filed in
6 response to a DOE requirement DOE should be required to consider the
7 application on their respective merits.

8 
9 LAWRENCE J. FAULK, Member